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Nos. 90-408 and 90-577

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

COUNTY OF YAKIMA, et al.,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,

Respondents.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,

Cross-Petitioners,

v.

COUNTY OF YAKIMA, et al.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS/ CROSS-RESPONDENTS

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QUESTION PRESENTED

Whether Yakima County may impose its ad valorem and real estate excise taxes with respect to real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the Yakima Nation or individual members of the Yakima Nation.

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The State of Washington respectfully submits this brief in support of the petitioners/cross-respondents, County of Yakima, et al.

INTEREST OF THE STATE OF WASHINGTON AS AMICUS CURIAE

The State of Washington contains 24 Indian reservations in addition to the Yakima Reservation. These other

reservations, like the Yakima Reservation, contain significant amounts of land which are owned in fee by either the Tribe or its members, and which will thus be affected by the outcome of this case. Further, a large portion of the property tax and most of the real estate excise tax are state taxes which, although collected by the county, go into the State general fund, for the support of the public school system. See Wash. Rev. Code § 84.52.065 (property tax) and §§ 82.45.060, .180 (real estate excise tax).

More is involved, however, than this direct financial interest. This case presents a facet of a more general problem, i.e., the extent to which the policies adopted by Congress in the General Allotment Act of 1887 have been modified by subsequent legislation, and the role of the courts in determining the scope and effect of those modifications.

INTRODUCTION AND SUMMARY OF ARGUMENT

We fully concur with the amicus brief of our sister states, Montana, et al. This separate brief is submitted, however, in order to discuss several points regarding the General Allotment Act, the Indian Reorganization Act, and the relationship between the two.

1. Section 6 of the General Allotment Act, both in its original wording in 1887 and after its amendment in 1906, is unmistakably clear: lands for which reservation Indians receive a fee patent are taxable. Indeed, the 1906 amendment made even more clear the congressional intent which the Court had found, in that same year, to be implicit in the very concept and purpose of a fee patent, i.e., that alienability of land and its taxability were to go together. Thus, the basic issue now presented to the Court does not involve any serious question about the intent of Congress in 1887 or 1906 to allow fee lands to be taxed. Rather, it involves the question of whether Congress has changed that intent since then. For decades, state and local governments throughout the country have been taxing fee land in response to the clear directions of the General Allotment Act. Did Congress ever say to them: "Stop; we have changed our mind"? If so,

when? And how? It certainly did not do so in 1934, when it passed the Act we here examine, the Indian Reorganization Act.

2. In that 1934 Act, to be sure, Congress changed its mind about major elements of the policies it had adopted in the General Allotment Act. Those previous policies or broader goals looked to the eventual elimination of reservations, of tribal governments, and of all the immunities of Indians from state law. They looked as well to elimination of federal supervision over Indians, the conferral of citizenship upon them—with the consequent right to all benefits of state and local governmental programs—and the conferral of the right to manage their own property. The aim was complete integration, legally and socially. The General Allotment Act set up a process designed to attain these broader goals, and that process would be triggered by the issuance of fee patents to tribal members.

In adopting the Indian Reorganization Act in 1934, Congress arrested that process, and thereby repudiated major elements of those policies and broader goals, to leave us with the system of partial integration which exists today. But there is no reason to think Congress repudiated as well its clear intent that fee lands should be taxable. Along with others, that part of the original package of policies remained.

3. That the taxability of fee land was not affected by the Indian Reorganization Act becomes especially clear from examining the position taken shortly after the Act's passage by the legal team in the Department of Interior which had put that Act together, Nathan Margold, the Department Solicitor, and his assistants Charles Fahy, and—most importantly—Felix Cohen. They were not only present at the creation of modern Indian policy, as embodied in the Indian Reorganization Act and its early implementation; they, along with Commissioner John Collier, were in large part the creators. And their consistent position after passage of the Act is that the taxability of fee land remains.

ARGUMENT

SECTION 6 MAKES IT UNMISTAKABLY CLEAR THAT LANDS ALLOTTED TO INDIANS ARE TO BE SUBJECT TO STATE TAXATION WHEN OWNED IN FEE; AND THAT INTENT WAS NOT CHANGED BY THE INDIAN REORGANIZATION ACT.

A. The Effect of the 1906 Amendment

There is no need to retrace the complete unanimity which has existed until now between the Courts and the Executive Branch on the basic question: Does § 6 constitute Congressional consent to taxation of Indian-owned fee land?[1] The amicus brief of our sister states fully covers this fundamental point, and shows the answer to be a long and unvarying "yes." We would anticipate, however, a possible suggestion that the reference, in the first proviso of the 1906 amendment of § 6, to the removal of "all restrictions as to the sale, incumbrance, or taxation of said land" upon issuance of a fee patent should now be confined in its application. The suggestion would be that this policy of removing restrictions on state taxation should be applied only when the fee patent has been issued on an accelerated basis pursuant to the proviso, i.e., before the expiration of the full 25-year trust period.

[1]Section 6 of the General Allotment Act (Act of Feb. 8, 1887, 24 Stat. 390) as amended by the Act of May 8, 1906 (34 Stat. 102), codified as 25 U.S.C. § 349, reads as follows:

> That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law; Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

Any such suggestion, however, would be entirely misplaced. It would impute to Congress an intent to create two types of fee land: taxable fee land if the trust period had been shortened, and non-taxable land if the trust period had not. No such distinction has ever been recognized; compare, for example, Solicitor's Opinion, Dec. 24, 1924, 50 I.D. 691, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 138 (land taxable upon issuance of fee patent after a shortened trust period) and Solicitor's Opinion, June 30, 1930, 53 I.D. 133, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 252 (land taxable upon issuance of fee patent after the full 25-year trust period). Lastly, any such distinction flies in the face of the legislative history of the 1906 amendment to § 6. That amendment made two, and only two, changes. First, it provided that Indian allottees would become citizens only upon issuance of a fee patent, not upon issuance of a trust patent—thereby effectively overruling *In re Heff*, 197 U.S. 488 (1905). Second, it provided that a fee patent could be issued before expiration of the full 25-year trust period if the Secretary of Interior deemed it appropriate in individual cases. See S. Rept. 1998, 59th Cong., 1st Sess., March 23, 1906, and 40 Cong. Rec. 3599 (1906) (remarks of Rep. Burke).

In short, there is simply no basis for now fracturing the unanimity which has so long prevailed: all fee land is to be taxed alike. The language in the proviso removing restrictions on taxation simply made explicit what the Court shortly found to have been implicit in the very concept of a fee patent: removal of restrictions on alienation implies removal of immunity from taxation. See *Goudy v. Meath*, 203 U.S. 146, 149 (1906).[2]

[2]As stated in *Goudy*: ". . . the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases while at the same time releasing it from taxation . . ." 203 U.S. at 149.

B. The Grand Design of the General Allotment Act

This linking of alienability and taxability, however, was only a part of the total grand design envisioned by proponents of the General Allotment Act. We need only note very briefly its major features.

That grand design might be thought of as involving a two-step process. First, the issuance of a fee patent conferred upon the allottee not only the right to manage and dispose of his land as he saw fit, free from governmental controls, but also full citizenship; and, along with all other citizens, the allottee was to ". . . have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which [the allottee] may reside." (Section 6) Second, this change in legal status on the level of the individual allottee was to result in the general disintegration and eventual disappearance of tribal governments and reservations, and the complete legal and social integration of Indians into the general population. See *United States v. Montana*, 450 U.S. 544, 549, n 9 (1981). Indeed, the Indian Bureau itself was to disappear as well from the legal and administrative landscape. In the colorful analogy of Senator Dawes, the principal proponent of the grand design:

> It seems to me that this is a self-acting machine that we have set going, and if we only run it on the track it will work itself all out, and all these difficulties that have troubled my friend will pass away like snow in the spring time, and we will never know when they go; we will only know they are gone.[3]

And again:

> Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished; the work for which they have been created * * is all gone, while you are making them citizens * * * That is why I don't trouble myself at all about how to change it [the machinery of administration].[4]

[3]Nineteenth report of the Board of Indian Commissioners (1887), 54; quoted in Felix Cohen, *Handbook of Federal Indian Law* (1942, Univ. of New Mex. Press reprint) 210.

Senator Dawes' grand design, however, did not see fruition. The "self-acting machine" was not allowed to continue to "run on the track." The Indian Reorganization Act halted it.

C. The Effect of the Indian Reorganization (Wheeler-Howard) Act

John Collier, appointed as Commissioner of Indian Affairs in 1933, quickly set out to halt the allotment process and to undo its major effects. In this task, he was aided by Nathan Margold, Solicitor for the Interior Department, and Margold's assistants, Felix Cohen and Charles Fahy.[5] Their efforts produced the original version of the Indian Reorganization Act, which was introduced in both the Senate and the House as administrative requests. See S. 2755, 73d Cong. 2d Sess. (1934) and H.R. 7902, 73d Cong. 2d Sess. (1934).[6]

In a memorandum submitted by Commissioner Collier to the Senate and House Committees on the introduction of these bills, he detailed the destructive effects of the allotment system, especially the loss of the Indian land base. See "Memorandum: The Purposes and Operation of the Wheeler-Howard Indian Rights Bill," 1934 House Hearings, 15-29. Yet he stated in that same memorandum: "The bill does not disturb, but expressly safeguards and preserves, every

[4]Ibid., 55.

[5]See K. R. Philp, *John Collier's Crusade for Indian Reform: 1920-1954* (1977, Univ. of Ariz. Press) 140.

[6]For the legislative history of these two bills, see generally Readjustment of Indian Affairs: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ("1934 Senate Hearings") and Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ("1934 House Hearings"). For the most detailed review of this legislative history to date, see Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 239-260 (1991).

vested right which has accrued through the workings of allotment." Ibid., at 19.

There is no need here to analyze all of the many changes which Commissioner Collier's original proposal underwent in the face of severe opposition from the Senate and House Committees on Indian Affairs and from various Indian groups as well.[7] Rather, we shall briefly examine the major provisions of the Act which finally emerged (Act of June 18, 1934, 48 Stat. 948, codified as 25 U.S.C. §§ 461 et seq.), in order to see just what they did, and did not do. Section 1 stopped any further allotments, on all Indian reservations. Section 2 extended indefinitely "the existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof . . .". These two sections were the heart of the Act, and together froze the status quo. The machine of Senator Dawes was stopped on the track, and his grand design doomed to frustration. Tribes and reservations were no longer destined to go out of existence through continuation of the allotment system.

Section 3 authorized the Secretary of Interior to restore to tribal ownership any remaining surplus reservation lands which had previously been available for sale. Section 4 prohibited the sale or transfer of any restricted Indian lands, unless the transferee was the Tribe or unless land of equal value was obtained in exchange. Section 5 authorized the Secretary to acquire for Indians lands or interests therein "through purchase, relinquishment, gift, exchange or assignment" and authorized an appropriation of $2 million for such acquisitions. Such lands were to be taken into trust and would be exempt from state and local taxation.

Sections 3 and 4, like §§ 1 and 2, were, in effect, freezing the status quo, while § 5, in contrast, provided a mechanism for restoring the pre-1887 situation to some extent, through reacquisition of lands for the Indians, on a parcel-

[7]For a discussion of these changes, and the opposition which prompted them, see *Two Promises, Two Propositions*, supra, 240-252, which focuses on the opposition from Congress, and Philp, op. cit., 135-161, which focuses on the opposition from Indian groups.

by-parcel basis. Except for acquisitions made under § 5, all fee land, whether owned by Indians or non-Indians, was to be left intact.

These five sections constitute, we suggest, the much-discussed repudiation of the allotment system. But none of them is the least bit incompatible with § 6 of the General Allotment Act. The Act leaves § 6 untouched.

D. The Aftermath: The Unanimity Continues

After passage of the Indian Reorganization Act, what were the views of the Interior Department regarding the continuing vitality of § 6 of the General Allotment Act and the taxability of fee lands? Because the legal staff of the Department, including Felix Cohen, had been involved in the drafting of the Indian Reorganization Act from beginning to end, their initial interpretations take on special importance.

Less than two months after passage of the Act, the question arose as to whether it prohibited further issuance of certificates of competency and fee patents. In a memorandum to Commissioner Collier, dated August 14, 1934, Solicitor Margold gave an unequivocal "no." He stated:

> I do not see any room for doubt or argument on the question whether the Wheeler-Howard Act forbids the granting of fee patents. Early drafts of the bill prepared in this Office specifically prohibited the granting of fee patents in the following terms:
>
> > "The authority of the Secretary of the Interior to issue to Indians patents in fee or certificates of competency or otherwise to remove the restrictions on land allotted to individual Indians under any law or treaty is hereby revoked."
>
> This specific prohibition was deliberately struck out at a hearing of the Subcommittee of the Senate Committee on Indian Affairs appointed to study the Wheeler-Howard Bill. It was struck out at the suggestion of Senator Wheeler, who declared, in substance, that it would be monstrous to deprive the Secretary of the Interior of discretion to release Indians of the standing of Mr. Curtis from restrictions on alienation.

At this time, you consented to Senator Wheeler's suggestion. I can see no reason for questioning now the effect of this deliberate omission. The memorandum of Mr. Reeves offers no argument for any other construction than the one thus confirmed by the history of the legislation.

I agree with your suggestion that, under the circumstances, the sweeping attempt in Section 4 to prohibit alienations of restricted Indian land is largely meaningless, and that the original purpose of the statute in this, as in several other respects, has not been achieved. The remedy for this, in my judgment, is amendatory legislation, rather than arbitrary interpretation of the legislation already secured which may be overthrown by a contrary construction on the part of a future Administration.

1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 426.

Thus § 6 of the General Allotment Act was still operative. But was its linking of alienability and taxability still operative as well? Or had the Indian Reorganization Act impliedly severed that link? Solicitor Margold clearly thought it had not been severed.

In another memorandum to the Commissioner, dated December 18, 1934, he considered the question of whether § 5 of the Indian Reorganization Act allows the United States to take fee land into trust for the purpose of avoiding taxation. The memorandum begins:

> The attached letter is returned to you for further consideration. The letter in effect holds that an Indian owning taxable land may convey such land to the United States to be held in trust for the individual Indian. Obviously this is a matter which will affect large numbers of Indians other than the particular applicant referred to in the attached communication.
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> 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 503.

After quoting the language of § 5, Mr. Margold continues:

> It is questionable, from a strictly legal point of view, whether such a transaction as that referred to falls within the declared purpose "of providing land for Indians." Aside from the narrow question of legality, it is believed that a matter of this sort should receive further consideration as to the policy involved than has apparently been given to the attached communication. Is it the intention of the Indian Office to eliminate taxation on all Indian lands now taxable? If not, by what criterion does the Indian Office propose to determine when an Indian owner of taxable land may avoid taxation through a transfer of the land to the United States Government followed by the receipt of a trust patent? Ibid. at 504.

Solicitor Margold's strong concerns would make no sense whatsoever if he believed the Indian Reorganization Act had somehow cut the link between alienability, pursuant to a fee patent, and taxability.

Yet a third opinion of Solicitor Margold should be examined. In an opinion to the Secretary of Interior dated December 13, 1934, he considered twelve questions relating to the Indian Reorganization Act. Question ten was as follows:

> Can land on the local tax rolls be relieved of the burden of local taxation when it is acquired by an organized tribe or tribal corporation, title being taken by the tribe or tribal corporation?
>
> 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs 489, at 491.

The transaction in question, unlike the transaction involved in the December 18, 1934 memorandum discussed previously, did not contemplate putting the land into trust status.

At no point does the opinion suggest that fee land acquired by the Tribe can be relieved of taxation simply because it is within a reservation. Rather, the opinion sets out only two conditions which would result in the tribally acquired land becoming tax-exempt. First, the land would be exempt if the Tribe would, "upon the circumstances of the particular case," be considered a Federal instrumentality. That expansive view of intergovernmental tax immunity

has, of course, since been discarded. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, at 150-152 (1973). Second, the opinion pointed out that a Tribe which had received a charter under § 17 of the Indian Reorganization Act was authorized to ". . . purchase . . . and dispose of property of every description . . . but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any land . . ." within the reservation. (This provision, we should note, puts no such restriction on the Yakima Nation since it has no such charter.)

The opinion reads this limitation on selling, mortgaging, or leasing tribally owned land as a limitation on taxation, by reasoning as follows:

> So it may be said, in the case under consideration, that it would be an exceedingly narrow construction of a provision which should receive liberal interpretation to hold that lands within an Indian reservation may not be sold by an incorporated tribe but may be sold on behalf of the tribe at a tax sale.
>
> In the converse situation, where the power to sell Indian lands was granted by statute to certain Indians, the Supreme Court held that voluntary and involuntary alienation were so closely linked as to indicate the intent of Congress to permit State taxation. The court declared:
>
> > "It requires a technical and narrow construction to hold that involuntary alienation continues to be forbidden while the power of voluntary alienation is granted * * *." (*Goudy v. Meath*, 203 U.S. 146, 150).

·Ibid. at 492.

Thus, far from finding that the Indian Reorganization Act has somehow cut the link between alienability and taxability, the opinion confirms that link, and indeed relies upon the very case which established the link in the first place, *Goudy v. Meath*.

Solicitor Margold's assistant, Felix Cohen, is equally clear in confirming the link. As he stated in his 1942 treatise: "Should he [the Indian allottee], on the other hand, apply for the issuance of a fee patent and be accorded one pursuant to law, there seems to be no reason to believe that his lands would not thereby become subject to state taxation."[8]

If there were any reason to believe otherwise, Felix Cohen, we suggest, would have been the person to have found it. Further, although federal Indian policy has swung back and forth, like a pendulum, it never swings completely back. Important elements and effects of the previous policy always remain. Solicitor Margold and Felix Cohen, we suggest, realized that, and recognized as well that the linking of alienability and taxability of land, as embodied in § 6 of the General Allotment Act, was one of those remaining elements.

Finally, a word regarding the future practical consequences of rejecting the position taken by Solicitor Margold's opinions and Cohen's treatise, and thereby breaking that link. As we have seen, Solicitor Margold expressed some doubts, in his December 18, 1934 memorandum, as to whether § 5 of the Indian Reorganization Act authorized taking Indian-owned fee land into trust status for the purpose of avoiding state taxes. Some 44 years later, that question was answered in *Tacoma v. Andrus*, 457 F. Supp. 342 (Dist. Ct. D.C. 1978); the district court held that § 5 granted such authority. The dispute involved three tracts of land located within the Puyallup Reservation and within the City of Tacoma. See *Tacoma v. Andrus*, 457 F. Supp. at 344. In apparent response to that decision, the Interior Department adopted, in 1980, policy guidelines for such transfers into trust status, as Solicitor Margold had originally suggested in his December 18, 1934 memorandum. See 25 C.F.R. Part 151. Among the factors to be considered in evaluating requests for transfer into trust is the following: "If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting

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[8]Cohen, op. cit., at 259.

from the removal of the land from the tax rolls;" 25 C.F.R. § 151.10(e).

For land within a reservation, such as the land involved in *Tacoma v. Andrus*, consideration of this factor makes no sense whatsoever if Indian-owned fee land is automatically tax exempt in any case. Further, these regulations give the affected governmental units an opportunity to challenge such proposed transfers into trust and thus an opportunity to prevent the consequent erosion of the tax base. (The practice of the Interior Department, fortunately, has been to notify governmental units of any proposed transfers.)

If the link between fee status and taxability is broken by the Court, even this last administrative protection will be removed. Tribes and individual Indians would be perfectly free to buy up large amounts of otherwise taxable land and, by the mere fact of Indian ownership, to remove them from the tax base. And the administrative protections embodied in these regulations will be, in effect, nullified.

CONCLUSION

For the reasons given above, the Court should uphold the taxability of all fee lands within the Yakima Reservation, and reverse the judgment of the Court of Appeals to the extent it is inconsistent with that holding.

Respectfully submitted,

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